(10)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. ~~391~~ 47

SAMUEL W. LAMBERT, APPELLANT,

vs.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR; DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM HAYWARD, AS UNITED STATES ATTORNEY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED FEBRUARY 28, 1925

(30,912)

(30,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 301

SAMUEL W. LAMBERT, APPELLANT,

vs.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR; DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM HAYWARD, AS UNITED STATES ATTORNEY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

E25-108

SAMUEL W. LAMBERT, Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Defendants

NOTICE OF APPEAL AND ORDER ALLOWING SAME—Filed June 13, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Edward C. Yellowley, Acting Federal Prohibition Director and David H. Blair, Commissioner of Internal Revenue by William Hayward, United States Attorney for the Southern District of New York and William Hayward, United States Attorney for the Southern District of New York in person, feeling aggrieved by the interlocutory [fol. 2] decree made and entered in the District Court of the United States for the Southern District of New York on the 29th day of May, 1923, in the above entitled suit granting an injunction pendente lite as prayed for in the bill of complaint herein, do hereby appeal from said decree to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error hereto annexed and filed herewith and pray that this appeal be allowed and that a transcript of the papers and proceedings upon which said decree was made duly authenticated be sent to the said Circuit Court of Appeals for the Second Circuit.

Dated, New York, June 12th, 1923.

William Hayward, United States Attorney, Solicitor for Appellant-Defendants, Yellowley and Blair, and in Person.

Appeal as prayed for is hereby allowed.
Dated New York, June 12, 1923.

John C. Knox, United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

SUBPŒNA—Filed November 22, 1922

The President of the United States of America to Edward C. Yellowley, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Samuel W. Lambert and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars ($250).

Witness Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of November in the year One Thousand Nine hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

Alex. Gilchrist, Jr., Clerk. Davies, Auerbach & Cornell, Complainant's Solicitors.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SAMUEL W. LAMBERT, Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Defendants

BILL OF COMPLAINT—Filed Nov. 18, 1922

To the Honorable Judges of the District Court of the United States, Southern District of New York, sitting in equity:

The complainants, by Davies, Auerbach & Cornell, his attorneys, for his bill of complaint against the defendants, respectfully shows:

First. The complainant is a citizen and resident of the State of New York, residing in the County of New York.

Second. The defendant, Edward C. Yellowley, is an agent of the Commissioner of Internal Revenue, duly appointed under the provisions of the National Prohibition Act; the defendant, David H. Blair, is the Commissioner of Internal Revenue, and the defendant [fol. 5] William Hayward is the United States Attorney for the Southern District of New York. All said defendants are charged with the duty of enforcing the National Prohibition Act in the County of New York and elsewhere in the Second Collection District of New York.

Third. This is a suit of a civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Three thousand Dollars ($3,000), exclusive of interest and costs.

Fourth. For the purpose of protecting the health and lives of its citizens against disease, the State of New York has from time to time enacted laws requiring that the persons practicing medicine must be specially educated and trained as physicians, and that advice in regard to the use of medicines and drugs as an incident of medical treatment should be given only by persons educated and trained for the medical profession. The said State has also provided by law that when so educated and trained and authorized to practice in accordance with the said laws, and not otherwise, physicians may give advice in regard to the use of medicines and drugs as an incident of medical treatment.

Fifth. Heretofore and in the year 1885, complainant, after having expended time and money in regularly prescribed training and studies to that end, was duly authorized by the State of New York to practice, and acquired the right to practice, medicine in the healing and curing of the sick and in the protection of human beings against attacks of disease, and ever since complainant has been con- [fol. 6] tinuously in the practice of such profession and is now practicing the same and enjoys a good reputation and standing as a physician.

Sixth. It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatmem as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

Seventh. According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written state-

ments and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

Eighth. It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that the use as medicine of spirituous liquors to be taken [fol. 7] internally is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent of alcohol by volume, including brandy, whiskey and wine.

Ninth. In prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case. It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Tenth. Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is [fol. 8] necessary and will afford relief to him from some known ailment.

Eleventh. By Section 7 of Title II of the National Prohibition Act it is provided in respect to physicians:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provisions limiting the amount of vinous or spirituous liquor that may be prescribed for the use of any one person during any period of ten days are contained in the Act signed by the President on the 23d day of November, 1921, entitled "An Act supplemental to the National Prohibition Act."

Section 29 of the National Prohibition Act purports to make a violation of any of its provisions a crime and purports to subject the offender to fine or imprisonment or both. Like penalties are provided for a violation of the above mentioned supplement to said Act.

Twelfth. Neither the National Prohibition Act nor the above men- [fol. 9] tioned supplement purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor does either of said Acts prohibit the giving by any person of advice in respect to such use or the quantities to be used. Neither of said Acts purports to regulate the use for medicinal purposes of spirituous liquors lawfully possessed, otherwise than under a physician's prescription, and neither Act purports to regulate the giving of advice in regard to such use except in the case of physicians' prescriptions.

Thirteenth. Complainant is advised and respectfully represents to the court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled "An Act supplemental to the National Prohibition Act" as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect.

Fourteenth. The defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fines and imprisonment, to prevent the complainant from prescribing for use as medicine to be taken internally by any patient within [fol. 10] any period of ten days, more than one pint of spirituous liquor, even though in complainant's best judgment, after careful physical examination of the patient, such use is necessary in order to afford relief from some known ailment. Such threatened proceedings would seriously interfere with complainant's ability to practice his profession and would subject him to irreparable damage.

Fifteenth. The threats and public statements herein complained of are directed not only against plaintiff but against other physicians of like belief and judgment in respect to the matters aforesaid, under like circumstances, and are therefore a matter of common concern to many physicians and to many patients. At a meeting of the Association for the Protection of Constitutional Rights, an associa-

tion of physicians having an extended and responsible practice, there was duly adopted a resolution of which a copy, with the names of some of the members of said Association, is hereto annexed, marked "Exhibit A."

Sixteenth. For the matters herein alleged the complainant has no adequate remedy at law.

Wherefore, the complainant respectfully prays an injunction, both permanent and temporary, restraining the defendants from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them.

And the complainant prays that the court by its decree declare unconstitutional so much of the Act of Congress designated as the National Prohibition Act and so much of the Act of Congress signed [fol. 11] by the President on the 23d day of November, 1921, entitled "An Act Supplemental to the National Prohibition Act," as are herein complained of.

And the complainant further prays for such other and further relief as may be just, including such preliminary restraining order as will protect the complainant's rights; and further prays that a writ of subpœna issue herein, directed to the above named defendants, commanding them on a day certain to appear and answer this complaint.

Davies, Auerbach & Cornell, Attorneys for Complainant, 31 Nassau Street, New York City.

Sworn to by Samuel W. Lambert. Jurat. Omitted in printing.

[fol. 12] EXHIBIT A TO BILL OF COMPLAINT

At a meeting of the Association for the Protection of Constitutional Rights, after full discussion and deliberation, the following Resolution was adopted:

Whereas, The Eighteenth Amendment to the Constitution of the United States provides only that

"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited";

and

Whereas, in such Amendment there is no restriction, directly or indirectly of the right of physicians to issue prescriptions for alcoholic liquor; and

Whereas, Section 7 of Title II of the National Prohibition Act, purporting only to carry said Amendment into effect, provides as follows:

Sec. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination [fol. 13] is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'cancelled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided;"

and

Whereas, subdivision (a) of Section 77 of Article XIII of the Regulations of said Act, in assumed furtherance of said Act, provides as follows:

"(a) No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case may spirituous liquor in excess of 1 pint within any period of 10 days be prescribed for the same person by one or more physicians. Further, where spirituous liquor is being administered to any person by any physician or physicians as provided in section 71, the aggregate quantity so administered and the quantity prescribed for any such person may not exceed 1 pint within any period of 10 days;"

[fol. 14] and

Whereas, Section 71 of the said Regulations provide that

"Physicians may obtain not more than 6 quarts of liquor during any calendar year to be administered to their patients only in the quantities necessary to afford relief at the time of administering;"

and

Whereas, the purport of such Section 7 of Title II of said Act is repeated in Section 2 of An Act entitled "An Act Supplemental to the National Prohibition Act;" and

Whereas, this Association is advised that the alleged justification for such provisions of the Act and Regulation is, that failure so to restrict the right of physicians to prescribe alcoholic liquor as a medicine would, necessarily operate to defeat the enforcement of the Volstead Act; and

Whereas, such a view is not only unjustified but is a wholly unwarranted reflection upon the good faith of the Medicial Profession of America as a whole; and

Whereas, the right to practice medicine is a Constitutional right; and, in the opinion of a vast number of physicians the administration of alcoholic liquor is essential for patients in extremis, for prolongation of life and for promoting recovery during convalescence, and that such administration is prevented by such Act and Regulation;

Now, therefore, be it

Resolved, that it is the sense of this Association that the constitutionality of such provision of the Act and the validity of such [fol. 15] Regulation be forthwith submitted to the courts; and that this Association requests its president, Dr. Samuel W. Lambert, under advice of counsel, to institute litigation to this end, in the interest of the public health and the preservation and prolongation of life, and for the vindication of the rights and honor of the profession; and it is

Further resolved, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished.

Brewer, George E.
Brooks, Harlow
Biggs, Hermann M.
Brown, Samuel A.
Brill, Nathan E.
Bacon, Gorham
Cussler, Edward
Caldwell, William E.
Carr, Walter Lester
Carter, Herbert S.
Coakley, Cornelius G.
Carlisle, Robert J.
Coleman, Warren
Chace, Arthur E.
Cahill, Geo. F.
Creevey, Geo. M.
Clemens, James B.
[fol. 16] Darach, Wm.
Downes, William A.
Draper, Wm. Kinnicutt
Duel, Arthur B.
Dana, Charles L.
Davis, Asa B.
Delatour, Beeckman J.
Dunning, Henry S.
Draper, George
Einhorn, Max
Edgar, J. Clifton
Erdmann, John F.
Ewing, James
Farrell, Benjamin P.
Fisher, Edward D.
Flint, Austin
Fordyce, John A.
Foord, Andrew G.
Gibson, Charles L.
Gregory, Menas S.
Gorton, James T.
Goodrich, Malcolm
Hurd, Lee Maidment
Halsey, Robert H.
Hartwell, John A.
Hess, Alfred F.
Holden, Frederick C.
Haynes, Royal S.
Holland, Arthur L.

Hitzrot, James Morley
Hunt, J. Ramsey
Hammond, Graeme M.
Hooker, Ransom S.
Chetwood, Charles H.
Hoag, Arthur F.
James, Henry
Kast, Ludwig
Keyes, Edward L., Jr.
Lusk, William C.
Lyle, Wm. G.
Lambert, Alexander
Lambert, Samuel W.
Longcope, Warfield T.
Libman, Emanuel
Lambert, Adrian Van Sinderen
McCarthy, Joseph F.
McKernon, James F.
McSweeney, Edward S.
Manges, Morris
Norton, Nathaniel R.
Northrup, William P.
Norrie, Van Horne
Nammack, Charles E.
Niles, Walter L.
Oppenheimer, B. S.
Oastler, Frank R.
Pedersen, James
Painter, H. McM.
Patterson, Henry S.
Pulley, William J.
Reese, Robert G.
Russell, James I.
Roberts, Dudley
Shelby, E. P.
Sondern, Frederic E.
Smith, Harmon
Squier, J. Bentley
Studdiford, William E.
Steward, George D.
Smith, Thomas A.
Sayre, Reginald H.
Saunders, T. Laurance
Sacks, Bernard
Taylor, Howard C.
Tilney, Frederick
Tyson, H. H.
Taylor, Fielding L.
Vaughan, Harold S.
Wightman, Orrin S.
Wallace, George B.
Wadhams, Samuel M.
Wilcox, Herbert B.
Wheelwright, Joseph S.
Whipple, Allen O.
Winter, Henry Lyle
Zinsser, Hans
Zabriskie, Edwin G.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER—Filed Jan. 17, 1923

Now come the defendants herein and for their amended answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The court has no jurisdiction to grant the relief prayed for or any part thereof.

[fol. 18] 3. The court has no jurisdiction of the action forasmuch as it appears on the face of the bill that the matter in controversy does not exceed $3,000 exclusive of interest and costs.

4. The bill does not present a cause of action in equity under the Constitution of the United States.

5. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

6. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

7. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. Defendants deny each of the allegations contained in Paragraph Third of the complaint.

Third. In answer to the allegations of Paragraph Sixth of the bill of complaint defendants deny that it is an essential part of complainant's right as a physician or of his duty toward his patients to prescribe any medicines or medical treatment which it is contrary to law to prescribe even though such medicines and medical treatment are in his opinion best calculated to effect a cure and establish the health of the patients.

Fourth. In answer to the allegations of Paragraph Eighth of the complaint the defendants allege on information and belief that it is the belief and judgment of large numbers of reputable and respon-[fol. 19] sible physicians throughout the United States which belief and judgment is buttressed by the writings of standard authorities on medical science that the use of spirituous liquors is never necessary for the proper treatment of patients in order to afford relief from ailments.

Fifth. In answer to the allegations in Paragraph Ninth, defendants allege on information and belief, that large numbers of eminent, reputable physicians deny that spirituous intoxicating liquors have any value as a medicine. Defendants further allege on information and belief that the prescription of more than one pint of such liquor in ten days for any complaint is not considered necessary by any large number of reputable physicians in the United States.

Sixth. Defendants deny the allegations contained in Paragraph Twelfth of the complaint.

Seventh. Defendants deny the allegations in Paragraph Thirteenth of the complaint.

Eighth. In answer to Paragraph Fourteenth of the complaint, defendants allege that they have made no threats against the complainant although they admit that if the complainant has or shall violate a law and knowledge of it is revealed to defendants he will be duly prosecuted as would any other person. Defendants are in-

formed and verily believe that the complainant has since October 28, 1919, pursued the practice of the profession of a physician profitably and successfully while the National Prohibition Act has been in effect, and defendants deny that there is any likelihood that the com- [fol. 20] plainant will suffer damage by continuing such practice of medicine.

Ninth. Defendants have no knowledge or information sufficient to form a belief as to the allegations of Paragraph Fifteenth. Defendants further allege that the allegations in said Paragraph Fifteenth of the complaint, as well as Exhibit A attached thereto, are irrelevant and impertinent to any issues purported to be raised by the bill of complaint herein.

Wherefore, the defendants pray that the bill of complaint herein be dismissed and the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

Office and Post Office Address: U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—Filed May 9, 23

SIRS: Please take notice that the undersigned will move this Court at a term thereof to be held in Room 237 United States Courts and Post Office Building, Borough of Manhattan, City of New York, on January 19, 1923, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint on the several grounds set out in Paragraph First of the amended answer herein, for judgment on the pleadings, and for such other and further relief as to the Court may seem just.

Dated New York, N. Y., January 17, 1923.

Yours, etc., William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

Office and Post Office Address: U. S. Courts and Post Office Building, Borough of Manhattan, City of New York.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed May 9, 1923

Davis, Auerbach & Cornell, Attorneys for Complainant (Joseph S. Auerbach and Martin A. Schenck, of Counsel).

William Hayward, United States Attorney, for Defendants (John Holley Clark, Jr., Assistant United States Attorney, of Counsel).

KNOX, D. J.:

Complainant, a duly licensed physician under the laws of this State, is here engaged in active practice. He alleges it to be an essential part of his professional right and duty towards his patients to treat their diseases and promote their physical well-being according to his best skill and judgment, and, to that end, to advise the use of such medicine and medical treatment as in his opinion are best [fol. 23] calculated to effect their cure and establish their health.

Based upon his experience, observation and study of medical science, complainant believes that the use as medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. Such spirituous liquors contain more than one-half of one per cent of alcohol by volume and include brandy, whiskey and wine.

Plaintiff now has under observation and subject to his professional advice certain patients whose ailments require that they should, for proper relief, use internally more than one pint of spirituous liquor in ten days, and that in certain cases it is necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding, that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant, conceiving it to be his duty so to do, intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Complainant has not prescribed, and does not intend to prescribe, the use of liquor for beverage purposes, nor does he intend to prescribe the use of liquor as medicine unless, after careful physical examination, he in good faith believes that the use of liquor as medicine is necessary for the patient and will afford him relief from some known ailment.

In practising his profession, as above outlined, Dr. Lambert finds himself confronted with certain provisions of the National Prohibition Act and its amendment, as follows:

[fol. 24] Section 7 of Title II of the Act of which reads:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe

liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford him relief from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provision relating to vinous and spirituous liquor is contained in the Act of November 23, 1921, entitled, "An Act Supplemental to the National Prohibition Act."

Both the original Act and its supplement make a violation of any of their provisions a crime, subjecting the offender to fine or imprisonment or both.

The bill goes on to allege that neither of the enactments purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor do they prohibit the giving of advice by any person in respect to such use or the quantities to be used. Neither do they purport to regulate the use of lawfully possessed spirituous liquors for medicinal purposes otherwise than under physicians' prescriptions nor to regulate the giving of advice in regard to such use, except in the case of physicians' prescriptions.

It is claimed that the limitations thus attempted to be imposed upon physicians are beyond the authority conferred upon Congress by [fol. 25] the Eighteenth Amendment to the Constitution, and are void and of no effect.

All this is followed by an allegation that defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fine and imprisonment, to prevent him from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spirituous liquor, even though in his best judgment and after careful physical examination of the patient, such use is necessary to afford relief from some known ailment. Such proceedings, it is said, would seriously interfere with complainant's ability to practice his profession, and would subject him to irreparable damage for which there is no adequate legal remedy. The matters complained of are asserted to be of common concern to many patients and many physicians, a number of whom have formed an organization called, The Association for the Protection of Constitutional Rights, and by resolution, have declared in favor of this suit.

In consideration of the foregoing, the Court is asked to declare unconstitutional so much of the aforementioned acts of Congress as to which complaint is made.

The answer sets up that the matter here in controversy does not exceed in value the sum of $3,000, exclusive of interest and costs, and denies that there is any duty upon a physician to prescribe medicine contrary to law; alleges that a large number of physicians deny the therapeutic value of spirituous liquors, and that prescriptions of

more than one pint of such liquors within ten days in any case is [fol. 26] not considered necessary by a large number of reputable physicians.

In view of the motion to dismiss, which admits the well pleaded allegations of the complaint, the answer upon the issuable facts need not be considered.

Whether or not the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent is a controversial subject with which the Court is not, at present, particularly concerned. That the subject is highly controversial is indicated by the results of a questionnaire directed to upwards of 30,000 physicians. Of this number, 51 per cent. declare whiskey to be necessary in the treatment of certain diseases, and 49 per cent. take a contrary view.

For the purposes of this motion, it is sufficient to accept the allegations of the complaint, and to consider that Congress itself, in the very legislation under attack, has recognized that in certain cases liquor has a legitimate medicinal use, and has specified the circumstances under which it may be prescribed in given instances. The difficulty is that having done so, Congress, without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering and irrespective of the good faith, judgment and skill of the physician in attendance, proceeds to limit the amount to be prescribed to not more than a pint within a period of ten days.

In passing upon the propriety of such limitation, it is necessary to bear in mind the grant of power under which the National Prohibition Law and its amendments, were enacted; and also to inquire whether considering the end in view the statute passes the bounds of [fol. 27] reason and assumes the character of a merely arbitrary fiat. Purity Extract Co. vs. Lynch, 226 U. S., 192; Ruppert vs. Caffey, 251 U. S., 264.

The eighteenth amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor "for beverage purposes" and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part at least, entertained by Congress in enacting the Volstead Law which permits the sale and use of sacramental wines; the use, in bona fide hospitals or sanitariums of such quantity of liquor, as may properly be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism; and the use of industrial alcohol under certain restrictions in arts and sciences. So far as the sacramental use of wine is concerned, there is no specific limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor.

If, as the complaint alleges, the administration to a patient of more than the statutory quantity of liquor is necessary for his relief from a certain known ailment, the inability of such patient to have his legitimate needs supplied, means that he is subjected to a prohibition [fol. 28] that certainly is not within the terms of the Eighteenth Amendment, and which easily may be imagined, might subject him to serious consequences, if not death itself. While the exercise of regulatory power in the interest of the public at large frequently brings about individual hardship, it is to be recalled that one of its chief objects is to preserve—and is not to jeopardize and destroy—the health of its citizens. For this reason, I feel that persons are not to be deprived of the use, when required, of such medicines as are proper and necessary for their relief, unless authority for such deprivation has expressly been conferred.

All of us recognize that the unregulated use of morphine, cocaine and other habit-forming drugs may have most baneful effects; but who would say, they should not, in a proper case, be prescribed by a competent physician?

Of course, the assertion can and probably will be made, that the possibilities to which I have referred, are a far call from the probability that any such result would be brought about through the absence of liquor from the treatment of any known ailment. It is, however, to be remembered that the admitted allegations of the complaint are that the use of more than a pint of liquor within ten days is necessary for the treatment of certain known ailments—the statute admits that the use of liquor may sometimes be necessary—and "necessary," while it may mean something less than indispensable, at least, includes that which is desirable, advisable and needful.

If this be true, it would seem not to be a function of the Congress—particularly, under the amendment, to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled [fol. 29] to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy. Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead Law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable necessities of the proper treatment of known ailments.

So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to

dismiss the bill, it being my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant of course cannot prevail.

As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the [fol. 30] Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting amendment to the States was recommended. The Committee in settting forth some of the arguments advanced by proponents of the measure reported the following:

"National law, enacted under an amended Constitution, could prohibit transportation and sale, and in concurrence with like legislation by the States (the union of the power of the nation and the power of the statutes), thus securing the entire strength of the whole community, could soon put an end to the traffic. Under such restriction in a generation or two the consumption of alcohol as a beverage would practically disappear. Alcohol would still be manufactured, distributed and sold under the restrictions appertaining to other poisons; and in *use as a medicine* (italics mine), and in the arts would not be interfered with. Its manufacture and distribution would be controlled by like regulations as those made with reference to dynamite, nitroglycerine and gunpowder, and the whole family of poisons, and in fact, all articles of great and dangerous potency which, nevertheless, have their legitimate uses for the benefit of mankind."

I have little or no doubt that it was the impelling force and reasonableness of the thought expressed by the foregoing quotation that brought about the submission of the amendment to the several States, and was responsible for its ratification by forty-five of them.

[fol. 31] Again, it is interesting in this connection to glance at the prohibition laws of some of the States and to see how they regard the medicinal use of liquor or of alcohol.

In Kentucky, the Supreme Court, speaking in the case of Sarls vs. Commonwealth, 83 Ky., 427, said:

"* * * while the Legislature has the power to regulate the sale of liquor to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine";

and again

"* * * the power of the Legislature to prohibit the prescription and sale of liquors to be used as medicines does not exist, and its exercise would be as purely arbitrary as the prohibition of its use and sale for religious purposes."

Missouri ratified the amendment upon January 16, 1919, and in the enforcement of the law, which took effect upon the date that the

amendment became operative, permitted the prescriptions by physicians of either alcohol or wine for medicinal purposes. The amount to be thus prescribed was not arbitrarily fixed. As late as March 28, 1921, the Legislature of that State amended the law so as to permit the prescription of intoxicating liquor other than that specified in the Act of January 16, 1918.

The State of Nevada, in a prohibition statute, enacted pursuant to a vote of her people, upon November 5, 1919, gave permission to [fol. 32] physicians to prescribe pure grain alcohol for medicinal purposes, and imposed no arbitrary limitation upon the quantity that might be used.

A somewhat similar statute is in force in New Mexico.

The Constitution of Michigan, Section 11, Article 16, makes provision for the prohibition of liquor traffic, except for medicinal, mechanical, chemical, scientific or sacramental purposes, and directs that legislation provide for regulations upon the sale of intoxicants. I find no artificial limitation upon the quantity that physicians may prescribe for medicinal use. For a construction of the State statute, see People vs. Ureavitch, 210 Mich., 431.

For years a law of Indiana made unlawful the retailing of spirituous liquor without license, and contained no exception in favor of a sale for medicinal purposes. By a long line of decisions it has been held that a bona fide sale for such purposes was not within the statute. See Donnell vs. State, 2 Ind., 608; State vs. Sholts, 15 Id., 119; Dixon vs. State, 76 Fed., 526. The present law, I am informed, provides only that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor except in writing, or in any case, unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

Alabama prohibits the sale of intoxicants for medical purposes save upon prescription of a regularly authorized physician.

In Florida, alcohol may be prescribed and used for medicinal purposes and so in Mississippi, South Carolina, Georgia, Arkansas, Delaware, Oklahoma, Oregon, Tennessee and Texas. In North Carolina, [fol. 33] grain alcohol may be sold for medicinal purposes, and it may be prescribed under certain conditions in Washington. In South Dakota, spirituous and vinous liquors may be prescribed. The statute of Kansas excepts from its operations the medicinal use of intoxicating liquors. Colorado and Minnesota regulate the quantity of liquor that may be prescribed upon one perscription, but they do not declare the amount that a patient shall use within a specified time.

Utah prohibits the prescription of any compound containing more than one-half of one per cent. of alcohol by volume and which is capable of being used as a beverage, and it is possible that a few other states have laws as drastic. I think, however, that it is fair to say that as a whole the ratifying states did not mean to dispense with the adequate use in a given case of such amount of specified intoxicants as were believed to possess therapeutic value.

It is, however, argued that, irrespective of all that has been said, the cases of Purity Extract Co. vs. Lynch and Ruppert vs. Caffey, supra, makes it necessary to dismiss the complaint. I freely admit those decisions give me pause. Nevertheless, it is to be remembered that the results in those cases were in no small measure based upon the legislative and judicial history of many of the States in dealing with local prohibition statutes. Under such a course of reasoning, I feel that much support is to be found for complainant's contention in the preceding summary of legislation within the States where prohibition has been recognized for many years, to be a proper and desirable policy. The regard which they manifested for the preservation of the right of the public to resort to the medicinal use of [fol. 34] intoxicating liquors in the treatment of known ailments, is not without influence in placing a construction upon legislation enacted pursuant to the limited authority of the Eighteenth Amendment.

From the foregoing, I have reached the conclusion that the limitations of the Volstead Act, and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment, if it is properly to be treated, requires the administration of a greater quantity, are void. An injunction pendente lite may issue against the defendant.

May 8, 1923.

John C. Knox, U. S. D. J.

[fol. 35] In United States District Court

[Title omitted]

Judgment and Order Granting Injunction—Filed May 31, 1923

This cause duly came on to be heard before this Court and motion having been made by complainant for temporary injunction pendente lite and motion having been made by defendants to dismiss the complaint, and due consideration having been had, it was

Ordered, adjudged and decreed that the motion of the defendants [fol. 36] to dismiss the complaint herein be, and the same hereby is denied and it is

Further ordered, adjudged and decreed that the defendants, and each of them be and they hereby are restrained and enjoined during the pendency of this action from enforcing or attempting to enforce against the complainant the provisions of Section 7, of Title II of the National Prohibition Act in so far as the said section prescribes that not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and it is

Further ordered that the operation of the injunction hereinabove set forth, be and the same hereby is stayed pending the determination

of an appeal to be taken from this decree by the defendants within the time prescribed by law.

Jno. C. Knox, U. S. D. J.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS.—Filed June 13, 1923

Come now the defendants and file the following assignment of errors upon which they will rely upon their appeal from the interlocutory decree made by this Honorable Court on the 29th day of May, 1923, in the above entitled cause.

First. That the Court erred in denying the motion of the defendants to dismiss the complaint herein.

Second. That the Court erred in granting complainant's motion for an injunction pendente lite and in restraining and enjoining the defendants during the pendency of this action from interfering with the complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes [fol. 38] upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by the Volstead Act and its amendments.

Third. The Court erred in not denying motion for an injunction pendente lite as prayed for in the bill of complaint.

Fourth. The Court erred in failing to hold that the suit herein was in fact one against the United States and that the complaint did not aver or show that the United States had consented to be sued therein.

Fifth. The Court erred in failing to hold that it was without jurisdiction to grant the relief prayed for or any part thereof.

Sixth. The Court erred in failing to hold that it had no jurisdiction of the action for as much as it appeared on the face of the bill that the matter in controversy did not exceed $3,000 exclusive of interest and costs.

Seventh. The Court erred in failing to hold that the bill of complaint did not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

Eighth. The Court erred in failing to hold that it appeared from the bill of complaint that the complainant had a plain, adequate and complete remedy at law.

Ninth. The Court erred in holding that the action of Congress in limiting the amount of liquor which might be prescribed to one per-

[fol. 39] son to one pint within a period of ten days, "does not constitute legislation appropriate to the object sought to be obtained to the adoption of the 18th amendment."

Tenth. The Court erred in holding that the limitations of the Volstead Act and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment if it is properly to be treated, requires the administration of the greater quantity, are void.

Wherefore, appellants-defendants pray that the decree of the said Court may be reversed and in order that the foregoing assignments of error may be a part of the record the appellants-defendants present the same to the Court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided.

All of which is respectfully submitted.

Dated New York, June 12, 1923.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

[fol. 40] CITATION—in usual form; Filed June 19, 1923; omitted in printing

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[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated October 5th, 1923.

Davies, Auerbach & Cornell, Attorneys for Complainant.
Wm. Hayward, Attorney for Defendants.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby certify that the foregoing is a correct transcript of the Record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of October, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk.

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD C. YELLOWLEY, as Acting Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Appellants (Defendants Below),

against

SAMUEL W. LAMBERT, Appellee (Complainant Below)

Before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge

William Hayward, U. S. Attorney, for appellants; John Holley Clark, Jr., of Counsel; Davies, Auerbach & Cornell, for appellee; Joseph S. Auerbach, Martin A. Schenck, Emily C. Holt, of Counsel.

OPINION

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, Circuit Judge. The complainant is a physician engaged in the practice of medicine in the City of New York. It is conceded that he is a man of great distinction in his profession and of wide and ususual experience in the practice of medicine. He filed a bill of complaint in the court below in which he asked that provisions [fol. 44] in the National Prohibition Act, commonly known as the Volstead Act, being the Act of October 28, 1919, 41 St. 305, c. 85) as well as of the Act Supplemental to the National Prohibition Act, being the Act of November 23, 1921, c. 134, also known as the Willis-Campbell Act, should be declared unconstitutional and that an injunction be issued restraining the defendants from interfering with the complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes upon the ground that the quantities prescribed for the use of any one person

in any period of ten days exceeded the limits fixed by the said Acts, or either of them.

The bill contained the following allegations:

"Sixth. It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

Seventh. According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written statements and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

Eighth. It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that the use as medicine of spirituous liquor to be taken internally is, [fol. 45] in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent of alcohol by volume, including brandy, whiskey and wine.

Ninth. In prescribing drugs and medicine, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case. It is the belief of the complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Tenth. Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment.

* * * * * * *

Thirteenth. Complainant is advised and respectfully represents to the court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled 'An Act supplemental to the National Prohibition Act' as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect."

The court below refused to dismiss the bill and granted an injunc-[fol. 46] tion—the material portion of which can be found in the margin.[1]

That portion of the National Prohibition Act complained of is found in Title II Section 7. It reads as follows:

"No one but a physician holding a permit to prescribe liquor shall issue any prescriptions for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'canceled,' together with the date

[1] "Further ordered, adjudged and decreed that the defendants, and each of them be and they hereby are restrained and enjoined during the pendency of this action from enforcing or attempting to enforce against the complainant the provisions of Section 7, of Title II of the National Prohibition Act in so far as the said section prescribes that not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and it is

Further ordered that the operation of the injunction hereinabove set forth, be and the same hereby is stayed pending the determination of an appeal to be taken from this decree by the defendants within the time prescribed by law."

when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose."

And that portion of the Act supplemental to the National Prohibition Act, which is complained of, is found in Section 2—the [fol. 47] material portion of which reads as follows:

"That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of thhe National Prohibition Act."

Before proceeding to a consideration of the legislation herein attacked it is necessary to consider a preliminary question which has been raised.

The objection has been made that the court below was without jurisdiction as the complaint did not show that the amount in controversy exceeded the sum of $3,000 exclusive of interest and costs. The complaint alleged that the suit was one of a civil nature and the amount in controversy was in excess of $3,000. And as the defendants below moved to dismiss the complaint they thereby admitted the facts alleged in the complaint so that they are in no position to raise the question of jurisdiction. Street v. Lincoln Safe Deposit Co. 254 U. S. 88. We may nevertheless point out that where an injunction is sought to prevent interference with the plaintiff's business, the amount in controversy is the value of the business to [fol. 48] be protected and of the rights of property which it is sought to have recognized and enforced. It is not merely the damages which have accrued prior to the commencement of the action which the court regards, but it looks to the effect upon the plaintiff's business through the entire period within which the damages is threatened. Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205, 225.

We come now to the consideration of the real question in this case which is the validity of the Prohibition Acts as they affect the right of a medical practitioner to prescribe spirituous or vinous liquors in the treatment of disease. And in the decision of this question we are governed by the fundamental rule which controls the courts whenever they are called upon to determine any constitutional question relating to the validity of an Act of legislation.

The courts of the United States from the beginning in an unbroken line of decisions have acted on the principle that every possible presumption is in favor of the constitutionality of an Act of Congress until it is overcome beyond all rational doubt. That principle was again stated in the recent case of Adkins v. Children's Hospital 261 U. S. 525, 544. The judicial duty of passing upon the constitutionality of the Acts of Congress herein involved being one of "great gravity and delicacy," this court must decide this case in favor of the validity of the Statutes unless it appears by clear and indubitable demonstration that Congress has exceeded its constitutional power in their enactment. The powers of Congress embrace those expressly granted by the Constitution and such as may be [fol. 49] implied from those so granted.

Whatever power Congress has to prohibit the use of intoxicating liquors as a beverage it derives from the Eighteenth Amendment to the Constitution. The material part of that amendment reads as follows:

"After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

And the Amendment gives to Congress and the several States concurrent power to enforce it by appropriate legislation.

That amendment, as Mr. Justice Holmes, speaking for the court in Grogan v. Walker & Sons, 259 U. S. 80, 89, said "meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the Statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. * * * It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business." There can be no doubt as to what Congress intended. It intended to put an end in this country to the use of malt and spirituous liquors for beverage purposes. And to that end it prohibited the manufacture, possession, sale, importation into and exportation from the United States, as well as transportation within the United States of liquor for beverage purposes.

The Amendment was incorporated into the Constitution because it was believed that the use for beverage purposes of intoxicating [fol. 50] liquors was pernicious in its effects and the cause of disease, pauperism and crime, and that the nation should protect itself

against the injurious consequences arising from the use of such liquors. It was thought that by this Amendment the public health, the public morals, and the public safety would be promoted by suppressing the evils connected with the excessive use of intoxicants.

The constitutionality of the State prohibition laws, when they came before the Supreme Court, had been uniformly upheld. As early as 1847, in the License Cases 5 How. 504, 577, Chief Justice Taney, referring to the suggestion that if a State deemed the traffic in ardent spirits to be injurious to its citizens and calculated to introduce immorality, vice and pauperism into the State it could prohibit it, said:

"And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself."

And see Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas 112 U. S. 201, 206; Mugler v. Kansas, 123 U. S. 623; Crowley v. Christensen 137 U. S. 86, 91; Purity Extract & Tonic Co. v. Lynch 226 U. S. 192, 201; Clark Distilling Company v. Western Maryland Railway Company 242 U. S. 311, 320; Seaboard Air Line R. Co. v. North Carolina 245 U. S. 298, 299; Crane v. Campbell, 245 U. S. 304. In the case last cited the court said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has [fol. 51] power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. * * *

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective."

The Acts passed by Congress under the authority conferred by the Eighteenth Amendment as well as the validity of the Amendment itself have been vigorously challenged by their opponents.

The complaints about the law have been many. Its opponents have challenged the constitutionality of the Amendment and of the Acts of Congress enacted under it and intended to make it effective but thus far to little or no purpose. In the case now before the court a new question is raised.

The constitutionality of the Eighteenth Amendment came before the Supreme Court in National Prohibition Cases 253 U. S. 350. The court held the Amendment was lawfully submitted by Congress to the States, was lawfully ratified by the States, and has be-

come a part of the Constitution and must be respected and given effect the same as the other provisions of that instrument.

In Jacob Ruppert v. Caffey 251 U. S. 264 the Supreme Court held that the provision in the National Prohibition Act which declares that the words "beer, wine, or other intoxicating malt or vinous liquors" shall be construed to mean any such beverages which contain one-half of one per centum or more of alcohol by volume, is constitutional. The decision went upon the theory that a measure reasonably necessary to make the prohibition of intoxicating liquors [fol. 52] effectual was within the power of Congress to enact even though it prohibited the use of liquor containing one-half of one per centum or more of alcohol, and such liquor was not in fact intoxicating.

In Everard's Breweries v. Day, 265 U. S. 545, the Supreme Court had before it Section 2 of the Act of November 23, 1921, in so far as it prohibits physicians from prescribing intoxicating malt liquors for medicinal purposes. That Act provides that "only spirituous and vinous liquor may be prescribed for medicinal purposes," and that all prescriptions for any other liquor and permits therefor shall be void. The contention was that the Act was unconstitutional as the prohibition of prescriptions for the use of intoxicating liquors was neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Eighteenth Amendment, and also that it infringed upon the legislative power of the States in matters affecting the public health. The court over-ruled the objections and sustained the constitutionality of the Act. Mr. Justice Sanford, writing for the Court, said:

"The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, sec. 8, cl. 18. In the exercise of such non-enumerated or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. (Citing cases.) Furthermore, aside from this fundamental rule the Eighteenth Amendent specifically confers upon Congress the power to enforce 'by appropriate legislation' the constitutional prohibition of the traffic in intoxicat- [fol. 53] ing liquors for beverage purposes. This enables Congress to enforce the prohibition 'by appropriate means.' National Prohibition Cases, 253 U. S. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon Legislative ground. Nor may it enquire as to the wisdom of the legislation. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating.

The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having 'steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages under the guise of medicine; facilitates many frauds, subterfuges and artifices; aids evasion and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment. A provision in a revenue act which tends to diminish the opportunity for clandestine traffic [fol. 54] in avoidance of the tax, has a reasonable relation to its enforcement."

We have quoted thus fully because the reasoning upon which that decision went is exactly the reasoning upon which we decide the case now before us. The only difference between that case and this is that the former case related to the prohibition of malt liquors while this relates to spirituous or vinous liquors, and the further distinction seems to us, so far as the legal right is concerned, that in the former case Congress prohibited any prescription of malt liquors while in this case we are concerned with the fact that it limited to a specified quantity the amount of spirituous or vinous liquor that can be prescribed within a fixed period. In the former case the court declared that in prohibiting prescriptions of intoxicating malt liquors for medicinal purposes Congress had not violated any personal rights of the appellants protected by the Constitution.

During the pendency of the bill in Congress hearings were had

before the Judiciary Committee and an extract from its report is found in the margin.[1]

[fol. 55] If Congress did not exceed the constitutional limits upon its legislative discretion in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, we are unable to see how it can be said that it exceeded the constitutional limits of its discretion in prohibiting physicians from prescribing for medicinal purposes "more than one-half pint of alcohol for use by any person within any period of ten days." It was urged upon the court in the first case that it was not within the power of Congress to prohibit physicians from prescribing malt intoxicating liquors for medicinal purposes, if in their judgment, such prescriptions seemed best, and according to their science and practice of medicine. There was evidence in that case not only that beer is a necessary therapeutic agent, but a leading physician's affidavit that he "had far greater occasion to prescribe beer than to prescribe spirituous or fermented liquors." It was said at the argument, and not wholly without justification, that the only fundamental distinction between the two cases was that the medical adherents of beer complained that they were entirely prohibited from prescribing this so called necessary therapeutic agent, while the medical adherents of whiskey and brandy were complaining of the restriction placed upon the amount of the spirituous or vinous liquors they were permitted to prescribe.

The Judiciary Committee in its report on the Willis Campbell Act, referring to Section 2, had this to say:

[fol. 56] "While the majority of the States prohibit wine for medicinal purposes, it was not deemed best by the committee that such provision should be inserted in the prohibition act at this time. In order, however, that this privilege should not be abused, it was deemed best to specifically limit its use, the same as has been done

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[1] "The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopoeia has never listed it as a medicine. One hundred and four of the leading physicians and scientists in the Nation signed the following statement: 'The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. They serve no medical purpose which can not be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an alcoholic liquor.' Several thousand other physicians signed the above, or a similar statement, and presented it to the committee. The attorney for the Anheuser-Busch Co. (Inc.) appeared before the committee and called attention to the fact that if beer was permitted as a medicine it would be impossible to enforce the prohibition law. There was only one doctor who appeared before the committee in favor of beer as a medicine, and the New York County Medical Association, the official medical association of New York, denied that he spoke for them in favoring beer for medicinal purposes."

with spirituous liquor. Unless some limit is placed upon the amount of such liquors that may be prescribed a number of physicians who do not have the high ethical standards of the large majority will abuse the privilege. Evidence was presented to the committee of physicians who issued hundreds of prescriptions within a few days when the total number of other prescriptions was a negligible number. In view of the fact that most of the States have more stringent provisions than the one contained in Section 2, this legislation will work no hardship upon the profession." (House Report No. 224, 67th Congress, 1st Session.)

The fact may also be noted that whether or not whiskey, wine or beer has a therapeutic value in the treatment of disease is a very much disputed question in the medical profession. In the year 1917 the American Medical Association, which has a membership of 150,000 physicians, passed a resolution discouraging the use of alcohol as a therapeutic agent, which resolution is in the margin.[1]

It is impossible for us to say as a matter of law that the limitation placed upon physicians in prescribing liquor as a remedy for disease is not fairly adapted to the end of protecting the people of the United States against the evils which result from the use of intoxicating liquors. We are not ignorant of the manifold difficulties attendant upon an attempt to enforce the laws prohibiting the use of intoxi- [fol. 57] cating liquors, and we have no right to say that such restriction as Congress has imposed upon the right of physicians to use such liquors in the treatment of disease, is so arbitrary, or unreasonable or without such proper relation to the legitimate legislative purpose, as renders the legislation in question void and without effect.

It appears that when the Statute was passed the Congress was aware of the opposing theories held by physicians as to the therapeutic value of spirituous and vinous liquors in the treatment of disease and was compelled to determine whether physicians, in the practice of their profession, should be permitted to prescribe them at all and if so to what extent. In Jacobson v. Massachusetts 197 U. S. 11, 30, the question was whether a compulsory vaccination law of a State was void as violating the liberty secured by the Constitution of the United States to every person within its jurisdiction.

In that case attention was called to the conflicting views entertained in the medical profession as to the value of vaccination as a preventative measure for smallpox. The court, in upholding the validity of the law, said:

[1] "Whereas, We believe that the use of alcohol as a beverage is detrimental to humanity economy, and

Whereas, its use in therapeutics, as a tonic or a stimulant or as a food has no scientific basis, therefore be it resolved that the American Medical Association opposes the use of alcohol as a beverage, and be it further

Resolved, That the use of alcohol as a therapeutic agent should be discouraged."

"We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public [fol. 58] health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all questions, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

And in like manner this court cannot say either that the Volstead or the Willis-Campbell Act unduly invades the complainant's liberty to practice his profession according to his judgment. It was for Congress and not the courts to determine whether it was necessary or advisable to permit these liquors to be prescribed at all by physicians and if to be prescribed to fix the quantity that may be prescribed at any one time or within a fixed period. And if, in the opinion of Congress, the public safety or the public morals required the prohibition of the use of intoxicants that prohibition might be absolute or qualified as Congress might determine. And we fail to discover anything in the Acts of Congress herein involved which is in violation of the constitutional guarantees of life, liberty and property. "No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare." Mugler v. Kansas, supra.

In Purity Extract Co. v. Lynch 226 U. S. 192, the court had before it the constitutionality of a Mississippi Statute prohibiting the [fol. 59] sale of malt liquors. Poinsetta was sold as a beverage. It contained no alcohol and was not intoxicating, and the question was whether being a malt liquor, and not alcoholic or intoxicating it was competent to prohibit its sale. The court upheld the law. In an opinion written by Justice Hughes, for a unanimous Court, he said:

"The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some

innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other States and the decision of the courts in its construction. State v. O'Connell, 99 Maine, 61; 58 Atl. Rep. 59; State v. Jenkins, 64 N. H. 375; State v. York, 74 N. H. 125, 127; State ex rel. Guilbert v. Kauffman, 68 Oh. St. 635; 67 N. E. Rep. 1062, Luther v. State (Nebraska) 20 L. R. A. (N. S.) 1146; Pennell v. State 141 Wisconsin, 35; 123 N. W. Rep. 115. We cannot say that there is no basis for this widespread conviction.

The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

A person has an inherent right to life and in order to maintain it a right to eat and to drink. But the right to drink liquors which are intoxicating the State or the United States may take away and in order to do so effectively the Government may take away the right to drink certain liquors containing alcohol insufficient in [fol. 60] amount to produce intoxication. That much is settled by the decisions of the courts. And for the same reason which leads the law-making power of a State or of the United States to prohibit the use of liquor containing a less amount of alcohol than is required to make it intoxicating, the law-making power may restrict the physician as to the amount of such liquor he can prescribe to his patient in a given period. We cannot say that a physician's right to prescribe alcohol in the treatment of disease is inherent and cannot be regulated or controlled by the law-making power of the State. The proposition is unsupported by authority and is unsound in principle.

It remains true that the inquiry in such a case as this is whether considering the end in view the legislation complained of, and which restricts the right of physicians to prescribe spirituous and vinous liquors in the treatment of disease, "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Because we cannot say that it does the decree is hereby reversed and the District Court is directed to dismiss the bill.

[fols. 61 & 62] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Dec. 25, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and the District Court is Directed to dismiss the bill.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H. M. T. M.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable Henry Wade Rogers, Chief Justice of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the appellee, by his solicitors, Davies, Auerbach & Cornell, and feeling himself aggrieved by the decree made and entered in this cause on the 26th day of December, 1924, reversing the order of the United States District Court, for the Southern District of New York, which granted to the appellee a preliminary injunction, and the United States Circuit Court of Appeals, for the Second Circuit, having furthermore decreed the issuance of a mandate directing the United States District Court for the Southern District Court of New York, to dismiss the bill of complaint herein, manifest error has intervened to the great damage of the petitioner, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers, upon [fol 64] which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.; that the jurisdiction of the Circuit Court of Appeals, for the Second Circuit, depends upon the fact that the complainant below sought an injunction, restraining the defendants-appellants from exercising any authority under the National Prohibition Act (Act of October 28, 1919, 41 St. 305, *3*. 85) and under the Act Supplemental to the

National Prohibition Act (Act of November 23, 1921, c. 134) to interfere with his acts as a physician, in prescribing vinous or spirituous liquors to his patients; that the amount involved herein and the matter in controversy exceeds the sum of One thousand dollars ($1,000), besides costs, and this is not a case in which the jurisdiction of the United States Circuit Court of Appeals is made final by statute.

Wherefore, petitioner prays for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for the issuance of a citation, and such other process as may be required to perfect the appeal prayed for, to the end that the error therein may be corrected.

Davies, Auerbach & Cornell, Solicitors for the Appellee, 34 Nassau Street, New York, N. Y.

Appeal allowed and citation directed to be issued and bond fixed [fol. 65] in the sum of One thousand dollars ($1,000) conditioned as the law directs, this 6th day of February, 1925.

Henry Wade Rogers, Judge United States Circuit Court of Appeals for the Second Circuit.

[fol. 66] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors

Now on this 6th day of February, 1925, comes Samuel W. Lambert, appellee, by his solicitors, Davies, Auerbach & Cornell, and respectfully says that the decree entered in the above named cause on the 26th day of December, 1924, is erroneous and unjust to the appellee in the following respects:

First. The Court erred in directing that the bill of complaint be dismissed.

Second. The Court erred in refusing to hold unconstitutional so much of the National Prohibition Act, and of the Willis-Campbell Act, supplemental thereto as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days.

Third. The Court erred in holding that the power of Congress to prohibit medical prescriptions of spirituous liquor could be implied from any of those powers expressly granted it.

[fol. 67] Fourth. The Court erred in holding that the reasoning and the decision of the Supreme Court in the case of Everard's Breweries v. Day, 265 U. S. 545 is exactly the reasoning upon which the present case was decided and in failing to hold that the reasoning

in the Everard's Breweries case leads to the conclusion that the statute passes the bounds of reason and assumes the character of a merely legislative fiat, in respect of its prohibition of medical prescription of spirituous liquor.

Fifth. The Court erred in holding that the only difference between the two cases was that the Everard's Breweries case related to the prohibition of malt rather than of spirituous liquor and in refusing to hold that the reasonableness of the prohibition of malt liquor had been sustained on the recognition by Congress of the prescription of spirituous liquor as a matter affecting the public health.

Sixth. The Court erred in refusing to hold that Congress, after recognizing the prescription of spirituous liquor as a matter affecting public health, passed beyond the constitutional limits upon its legislative discretion in proceeding to prohibit the prescription of more than one pint in ten days, without examination into either the necessity thereof or the effect thereof upon life and health.

Seventh. The Court erred in holding that the National Prohibition Act (Act of October 28, 1919, 41 St. 305 c. 85), and the Act supplemental to the National Prohibition Act (Act of November 23, 1921, c. 134) did not place arbitrary and unreasonable prohibitions upon the right of physicians to use vinous and spirituous liquors in [fol. 68] the treatment of diseases, and in refusing to hold that Congress thus exceeded its powers to enforce the law prohibiting the use of intoxicating liquors as beverages.

Eighth. The Court erred in holding that it appears when the Statute was passed that Congress was aware of opposing theories held by physicians on the value of spirituous liquors as therapeutic agents and further erred in holding that Congress was thereby compelled to determine whether physicians in the practice of their profession should be permitted to prescribe them.

Ninth. The Court erred in holding that the National Prohibition Act and the Act supplemental thereto (supra) did not invade the complainant's liberty to practice his profession according to his judgment.

Tenth. The Court erred in holding that Congress had the power under the Eighteenth Amendment to enact laws, which would deprive a citizen of the United States of the right to a physician's unhampered judgment as to the quantity of vinous or spirituous liquors, which may be necessary for the treatment of his diseases in any given period of time.

Eleventh. The Court erred in holding that "for the same reason which leads the law making power of a state or of the United States to prohibit the use of liquor containing a less amount of alcohol than is required to make it intoxicating, the law making power may restrict the physician as to the amount of such liquor he can prescribe to his patients in a given period."

Twelfth. The Court erred in refusing to hold that there was a [fol. 69] distinction between the beverage use of vinous and spirituous liquors and the medicinal use thereof.

Thirteenth. The Court erred in refusing and failing to recognize that the prescription of vinous or spirituous liquors for medicinal purposes is not "a beverage purpose" within the meaning of the Eighteenth Amendment to the Constitution, as ratified by the several states of the Union

Fourteenth. The Court erred in refusing to hold that a physician's right to prescribe alcohol in the treatment of disease is inherent and further erred in refusing to hold that a patient's right to such a prescription, in accordance with his physician's best judgment, is inherent.

Fifteenth. The Court erred in refusing to hold, as was held by the District Court, that Congress after recognizing that spirituous liquor had a legitimate medicinal use, proceeded arbitrarily without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering, and irrespective of the good faith, judgment and skill of the physician in attendance, to limit the amount to be prescribed to no more than a pint within a period of ten days.

Sixteenth: The Court erred in refusing to hold, as was held by the District Court, that the prohibition in the legislation "does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of a disease."

Wherefore, the appellee prays that the decree of the United States [fol. 70] Circuit Court of Appeals for the Second Circuit be reversed; that the United States District Court for the Southern District of New York be directed to reinstate the bill of complaint herein and the order of that Court granting a preliminary injunction be affirmed and the injunction be made permanent.

Davies, Auerbach & Cornell, Solicitors for Appellee, No. 34 Nassau Street, Borough of Manhattan, City of New York.

[fols. 71-73-] Bond on Appeal for $1,000—Approved and filed Feb. 6, 1925; omitted in printing

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[fol. 74] In United States District Court

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 73 inclusive, contain a true and complete

transcript of the record and proceedings had in said Court, in the case of Edward C. Yellowley et al., Appellants, against Samuel W. Lambert, Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of February in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 75] CITATION—In usual form, showing service on Wm. Haywood; omitted in printing

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Endorsed on cover: File No. 30,912. U. S. Circuit Court of Appeals, Second Circuit. Term No. 301. Samuel W. Lambert, appellant, vs. Edward C. Yellowley, as acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney. Filed February 28th, 1925. File No. 30,912.